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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BILLY DALE POWELL, JR.,

Defendant and Appellant.

F075609

(Super. Ct. No. MCR045961)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Joseph A. Soldani, Judge.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Sally Espinoza, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

In 2013, the victims in this case, who were six and ten years of age, were walking to a market near their home in Madera County with their mother and two friends. As they approached the entrance of the store, defendant Billy Dale Powell, Jr., called out to them, pulled down his pants, exposed his genitals and ran away. Defendant was arrested shortly thereafter and charged with two counts of annoying or molesting a child under 18 years of age with a prior conviction for sexual penetration, in violation of Penal Code section 647.6, subdivision (c)(2),¹ and one misdemeanor count of indecent exposure, in violation of section 314, subdivision (1).²

In 2016, prior to the commencement of trial, defense counsel declared a doubt as to defendant's mental competency and the court appointed three experts to examine him. (§ 1368, subd. (b); Evid. Code, § 730.) One of the psychologists appointed opined that defendant was not competent to stand trial, while the other two psychologists opined that he was competent. The jury subsequently found defendant competent to stand trial and he was convicted on all three counts. Defendant admitted suffering a prior violent felony within the meaning of the "Three Strikes" law and, in a bifurcated proceeding, the trial court found true that defendant also suffered a prior serious felony conviction within the meaning of the Three Strikes law.³ (§ 667, subds. (b)–(i).) The court sentenced defendant to a term of 25 years to life under the Three Strikes law on count 1 and a concurrent term of 25 years to life on count 2. (§ 667, subds. (e)(2)(C)(ii), (iv)(II).) On count 3, the court sentenced defendant to 180 days with credit for time served.

¹ All further statutory references are to the Penal Code unless otherwise stated.

² Section 647.6 was amended effective January 1, 2019, but that amendment is not relevant to the issues raised in this appeal. (Stats. 2018, ch. 423, § 63, pp. 117–118.)

³ Defendant was previously convicted of sexual penetration of a child under the age of 14 years under section 289, subdivision (j), and arson of property under section 451, subdivision (d).

II. Summary of Competency Phase Evidence

A. Dr. Seymour

Dr. Seymour, a clinical and forensic psychologist, was the first to evaluate defendant. He considered documents relating to defendant's crime and defendant's jail medical records dating back to 1994; he tested defendant using the Revised Competency Assessment Instrument (RCAI), which was developed based on the competency criteria in California and assesses an individual's understanding of the legal system; and he conducted a mental status examination and a face-to-face clinical interview approximately 40 minutes in length. Dr. Seymour concluded that defendant was not competent to stand trial.

Dr. Seymour testified that defendant has a history of and was diagnosed with psychotic illness, which is the loss of contact with reality that can include delusional thinking; hallucinations, usually auditory; and difficulty with thought control, concentration and attention. Defendant reported hearing voices that told him what to do, but he stated he does not follow the commands. Dr. Seymour found this information corroborated by past medical records. Defendant also has a history of and was diagnosed with significant methamphetamine abuse, and his history includes reported suicide attempts. Defendant's psychotic illness was treated in the past with antipsychotic medication and antidepressants, but, at the time of Dr. Seymour's evaluation, defendant did not want to take antipsychotic medication and was not cooperating in that regard.

Dr. Seymour explained that intelligence may factor into competency, but the impairment in intellectual functioning must be significant and he assessed defendant's intelligence in the low to average range. He also explained that a lower level of intelligence paired with psychosis may but does not necessarily make grasping concepts more difficult.

Defendant had difficulty staying focused and on topic during the evaluation. His ability to process was "fair" and he understood what was going on, what was said to him

and what was asked of him, but he would wander off topic and had to be drawn back. In Dr. Seymour's opinion, defendant's difficulty staying focused would hinder his ability to assist trial counsel and, specifically, "with an untreated psychosis, it would be difficult for [defendant] to maintain his attention and to interact through a full trial with his attorney." Dr. Seymour was able to have a rational discussion with defendant, but if the conversation became more detailed, defendant would state he did not know or did not remember and then stop, although defendant did not "shut down." This raised a concern for Dr. Seymour regarding defendant's ability to keep up with the pace of trial, including the questions and answers that occur during a trial. Additionally, defendant self-reported that he becomes extremely anxious in court and struggles to pay attention, which is why he wants to settle his cases quickly.

Dr. Seymour concluded that defendant's history is consistent with chronic schizophrenia, likely exacerbated by methamphetamine use, and antisocial personality disorder. He explained that schizophrenia is a psychotic disorder that affects 1 percent of the population, usually develops in one's late teens or early 20's, and includes positive and negative symptoms. He described defendant as having positive symptoms of hallucinations and delusional thoughts, and negative symptoms of impaired concentration and inability to focus for extended periods of time. Dr. Seymour also explained that antisocial personality disorder involves fixed characteristics, and individuals with the disorder tend to engage in criminal behavior or other violations of rules. Anger or aggression can occur with the disorder as well.

Dr. Seymour also addressed the issue of malingering, which he described as a term rather than a diagnosis. Dr. Seymour defined malingering as faking symptoms to obtain a desired outcome in a legal context, and he explained that in any competency assessment taking place within a legal setting, there is awareness of malingering as a possibility. Here, however, defendant did not bring attention to his symptoms, a tendency of

malinger, and he instead only discussed his symptoms when specifically asked. As such, Dr. Seymour did not see any strong indication of malingering with defendant.

B. Dr. Taylor

Dr. Taylor, a psychologist who is board certified in clinical psychology, evaluated defendant a few days after Dr. Seymour. He reviewed the charges, police reports, defendant's criminal history, and defendant's jail medical records dating back to 2013, when defendant was arrested. He interviewed defendant over the course of 45 to 60 minutes and did not administer the RCAI or another such assessment instrument, explaining that he has a standard list of questions and has not found an instrument to be of benefit. Dr. Taylor conceded that this was not a clear-cut case with respect to competence and there was conflicting evidence to evaluate. He concluded, however, that defendant was competent to stand trial.

Dr. Taylor found defendant to be a bit anxious, but congenial, alert and responsive. Defendant denied having visual hallucinations, but vaguely described hearing voices. Defendant reported that he heard voices constantly, which Dr. Taylor testified is unusual. Dr. Taylor explained that genuine hallucinations are often more specific, but given that defendant spoke of hearing Lucifer and angels talk, he thought "there may be some genuineness to it." He did not observe any behavioral manifestations of hallucinations during his interview with defendant, but opined that auditory hallucinations do not make a person incompetent to stand trial in any event.

Dr. Taylor administered the Miller Forensic Assessment of Symptoms, a screening test for malingering. He explained that while the test cannot rule out malingering absolutely, defendant's results were "consistent with genuine responding," and he did not think defendant was malingering.

Dr. Taylor's diagnostic impression of defendant was "unspecified schizophrenia spectrum and other psychotic disorder." Although defendant had a scattered thought process and expressed himself oddly during the interview, Dr. Taylor was not of the

opinion that defendant's ability to understand the nature and process of criminal proceedings and assist his attorney was impaired. Dr. Taylor agreed that someone working with defendant might have to be more patient with him, but his scattered thought process was "characterological"; that is, it "is kind of who he is." Dr. Taylor testified that if defendant had digressed further off topic, that would have been more indicative of an inability to function in a rational manner, but when Dr. Taylor asked clarifying questions during the interview, defendant was able, without more direct intervention, to return to topic and provide factual, rational responses. Dr. Taylor concluded defendant "had both a factual and a rational understanding of what the courtroom proceedings were" and "could, in a rational way, talk with his attorney."

On cross-examination by defense counsel, Dr. Taylor testified that he had to clarify some things two or three times, but defendant would return to topic with little effort on his part and he did not think defendant's ability to concentrate would be affected by additional distractions at trial that were not present during their one-on-one interview in the jail. Dr. Taylor concluded that defendant's intelligence was low to average, his abstract thinking was weak, and his capacity for insight was poor. On redirect examination, Dr. Taylor described abstract thinking skills as on a continuum and although one needs some such skills, the absence of good abstract thinking skills does not necessarily make a person incompetent. In Dr. Taylor's opinion, defendant's abstract thinking skills were weak, but they were sufficient nonetheless for courtroom proceedings, and the fact that defendant did not use full, complete sentences to express himself did not mean he was unable to assist his attorney.

C. Dr. Della Porta

Finally, Dr. Della Porta, a clinical psychologist employed by the California Department of Corrections, evaluated defendant several weeks after Dr. Taylor. Dr. Della Porta reviewed defendant's records, including Dr. Seymour's and Dr. Taylor's reports; met with defendant for approximately one hour forty minutes; and administered

the RCAI and the Test of Memory Malinger (TOMM) to defendant. Dr. Della Porta concluded defendant was competent to stand trial.

He found defendant calm, alert, oriented, cooperative and rational without evidence of psychosis, although defendant became more anxious and tenser as questioning began. Defendant reported hearing voices in his head that were not merely thoughts. He used full, complete sentences, but answered questions quickly as if he did not give his answers a lot of thought and he seemed to lack confidence. Dr. Della Porta went over some information with defendant more than once, which he explained was necessary to assess whether defendant's responses were the result of a lack of effort or the result of paranoia. Dr. Della Porta explained that if defendant was paranoid, he would be disinclined to answer questions even after receiving some education. Defendant in fact answered questions after some education, and Dr. Della Porta began to rule out paranoia and other unspecified psychotic symptoms as a result. He also stated that he thought defendant's anxiety was interfering and might lessen with some explanation.

Dr. Della Porta administered the TOMM to defendant to assess the possibility of malingering, but he explained that ruling out malingering requires a battery of psychological tests and all other mental disorders must be excluded, a task beyond the scope of the evaluation. He designated defendant as "rule-out malingering," which he explained meant there is a possibility of malingering, but no evidence or conclusion of it.

Dr. Della Porta's diagnostic impression of defendant was that he suffered from amphetamine dependence, cannabis dependence and anxiolytic sedative hypnotic dependence, meaning defendant had used methamphetamine, marijuana and Klonopin, which is a sedative, on a regular basis for much of his life. He did not form any other diagnostic impressions of defendant and stated that he found defendant stable, without anger, and without any mental illness that would impact defendant's ability to understand what was going on in court and assist counsel.

III. Analysis

At the outset, we observe that all three licensed psychologists had decades of professional experience. Dr. Seymour and Dr. Taylor estimated they had conducted approximately 1,500 mental competency evaluations, while Dr. Della Porta estimated he had conducted close to 1,000. Understandably, defendant does not challenge any of the psychologists' qualifications to render an opinion in this case.

Defendant argues that the jury's competency finding is not supported by substantial evidence. In our view, his contentions center not on deficiencies in the evidence, but on his disagreement with the jury's decision to credit Dr. Taylor's and Dr. Della Porta's conclusions of competency rather than Dr. Seymour's conclusion of incompetency. This does not suffice as a basis on which to successfully challenge the jury's determination.

A. Prior Medical Records and Use of Antipsychotic Medication

Defendant asserts that neither Dr. Taylor nor Dr. Della Porta reviewed his mental health history dating back to 1994 and that it was integral to Dr. Seymour's diagnostic impression. Competency to stand trial is *presumed*, however (§ 1369, subd. (f); *In re R.V.* (2015) 61 Cal.4th 181, 189), and the evaluations performed by all three psychologists necessarily focused on defendant's present rather than past mental state. Additionally, while it is true Dr. Seymour testified that defendant's jail medical records date back to 1994 and Dr. Taylor testified he reviewed jail medical records dating back to 2013 while conceding that additional information is always useful, there is no indication in the record that there exists relevant information predating 2013 that undermines either Dr. Taylor's or Dr. Della Porta's opinion of competence at the time of their evaluations. To the contrary, Dr. Taylor formed a diagnostic impression similar to the one formed by Dr. Seymour; both diagnostic impressions included recognition of defendant's auditory hallucinations, schizophrenia, and scattered thought processes. The critical distinction was in their opposing conclusions regarding defendant's competence.

As well, it is true that Dr. Seymour noted defendant was previously treated with antipsychotic medication and, at the time of evaluation, he was unwilling to take medication. Dr. Seymour testified that antipsychotic medication typically controls symptoms and helps with focus and, in his opinion, medication would be effective for defendant and would restore his competency in “relatively short order.” He stated that in the absence of medication, it is possible but rare to recover competency. As we have stated, however, the focus of the competency evaluation was defendant’s mental state at the time of the evaluation, and Dr. Taylor and Dr. Della Porta concluded that defendant’s ability to understand the proceedings and assist his counsel was sufficient. Defendant points to nothing in the record that would compel a rational trier of fact to conclude that in the absence of antipsychotic medication, defendant was incompetent to stand trial.

B. Knowledge of Court Process and Ability to Assist Counsel

Subject to some variation, all three experts asked defendant questions about the court process and those involved in it in an effort to assess his ability to understand the proceedings and assist his counsel. Defendant cites his statement to Dr. Taylor that there was no evidence against him as indicative of his inability to discuss the case with defense counsel, and he points out that Dr. Taylor found his competence to be a close question. He also points out that Dr. Taylor found his thought processes scattered, there were some questions he was unable to respond coherently to,⁴ and he thought the worst consequence of a conviction would be a treatment program.

⁴ For example, when defendant was asked by Dr. Taylor why he might choose to remain silent, he responded, ““To either jeopardize, take my truth, to exploit me as somebody I’m not. They will exploit what I’m saying to turn against me and from money hungry people.”” Dr. Taylor stated the answer is “an example to me of this kind of odd verbiage that [defendant] can use and this kind of scattering of his thought processes where he has the kind of basic idea in there, but it’s couched with, I suppose, kind of like a dirty living room. You’ve still got your TV in there and you still have a chair, but you’ve got a bunch of other garbage around. [¶] His expression of that is odd. But what he’s clearly, to me, saying, he understands that if he—that the right to remain silent is there for—so that he won’t get exploited, or that he—in order for him to not say something that could in some fashion harm him.”

However, “[a] defendant’s “technical legal knowledge” is irrelevant” (*People v. Blair* (2005) 36 Cal.4th 686, 711, disapproved on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919–920), and although Dr. Taylor thought the question of competence was close, he nevertheless concluded that defendant was competent. Dr. Taylor explained that, standing alone, defendant’s response regarding treatment might indicate he thought that was the worst that could happen, but the response had to be considered in context and defendant’s other responses indicated he was aware he would be incarcerated. Dr. Taylor conceded that some responses, such as those regarding the evidence against him, indicate that he might have some difficulty assessing the evidence, but he explained that given the conflicting evidence as to defendant’s competency, the evidence had to be weighed in reaching a conclusion. Notably, Dr. Seymour testified that defendant did not have difficulty understanding questions. Rather, it was his ability to focus and interact with his attorney that caused Dr. Seymour concern. Dr. Taylor also recognized defendant’s scattered thought process and tendency to wander off topic, and he acknowledged that someone working with defendant would need to be patient. However, in contrast with Dr. Seymour, he ultimately concluded that defendant’s ability to understand the criminal proceedings and assist his attorney was sufficient, and, therefore, defendant was competent to stand trial.⁵

C. Coaching

Finally, defendant criticizes Dr. Della Porta for “coaching” him on the answers, thereby “produc[ing] a result lacking in intellectual integrity.” Dr. Della Porta testified that he “educated” defendant on the questions. He explained that he did so because defendant answered questions “very quickly” and he wanted to assess whether defendant

⁵ Defendant argues that Dr. Taylor “neglected to consider how someone with marginal ability [to think abstractly] and concentrate in a brief clinical interview would fare in trial proceedings, requiring six hours of concentration a day.” To the contrary, Dr. Taylor testified that he did not believe the additional distractions at trial would affect defendant’s focus.

was possibly paranoid or simply not putting in any effort. Additionally, he believed defendant's anxiety was interfering with his ability to answer. Dr. Della Porta stated that rather than moving on to a new question, which would simply continue defendant's anxiety, he thought providing some education might, perhaps, lower his anxiety. Under these circumstances, it was for the trier of fact to determine what weight to give Dr. Della Porta's assessment.

We observe that Dr. Della Porta's process bears no resemblance to that criticized in *People v. Jackson*, which involved a defendant who "suffers from a stable developmental disability—mild mental retardation—which limits his capacity for understanding and communication." (*People v. Jackson* (2018) 22 Cal.App.5th 374, 376.) The defendant in that case was found incompetent both before and after Patton State Hospital staff represented that he had regained competency, a determination the trial court accepted but the Court of Appeal rejected on review. (*Id.* at pp. 376–377.) The Court of Appeal found that "Patton staff drilled [the defendant] in 'intense individual and group treatment sessions to increase his knowledge of judicial terminology and procedures.'" (*Id.* at p. 382.) "[T]hey decided to put [the defendant] through drills aimed at teaching him the rudiments of the judicial system. They wrote that despite his 'innate, biological intellectual ability,' 'he has demonstrated adequate though rudimentary understanding of court processes.' They noted, however, that 'he requires assistance to effectively weigh options in problem solving and make well-informed decisions. He responds best to *simplistic, concrete communication* that is *repeated to him numerous times*.'" (Italics added.) They then point to the answers he was able to give [to] their repeated, simplistic questions about plea bargains, judges, prosecutors, and evidence as evidence that he had attained competency. We conclude the evidence that Patton staff drilled [the defendant] in how to answer the most basic questions about the judicial process and he learned to parrot the expected responses after numerous repetitions did not provide substantial evidence [the defendant] was competent to stand trial. As Dr. Kania

opined, the fact [the defendant] could respond only to ‘simplistic and concrete communication that is repeated to him numerous times ... suggest[s] that he is *not* trial competent,’ rather than the opposite. (Italics added.)” (*Id.* at pp. 394–395.) The record in this case suggests no such drilling occurred.

D. Conclusion

We must view the evidence in the light most favorable to the jury’s finding of competence and that finding is supported by Dr. Taylor’s and Dr. Della Porta’s professional opinions as licensed psychologists. (*Mendoza, supra*, 62 Cal.4th at p. 871.) Defendant relies on *Mendoza* to bolster his argument, but we do not find the case of assistance to him. To the contrary, the California Supreme Court concluded that the jury’s competence finding in *Mendoza* was supported by substantial evidence notwithstanding that the “[d]efendant presented considerable[, although not unrefuted,] evidence of incompetency” (*Id.* at p. 878.) In this case, Dr. Taylor’s and Dr. Della Porta’s opinions constituted solid, credible evidence supporting the jury’s competency finding. While Dr. Seymour’s opinion also constituted solid, credible evidence from which a rational trier of fact *might have* concluded that defendant was incompetent, the evidence did not compel that conclusion. (*Ibid.*; cf. *People v. Samuel* (1981) 29 Cal.3d 489, 497–498, 500, 506 [jury’s competency finding not supported by substantial evidence where five psychiatrists, three psychologists, one medical doctor, one nurse, three psychiatric technicians and four psychiatric reports concluded that the defendant, who had chronic schizophrenia, some degree of mental retardation and some organic dysfunction, was incompetent and the evidence of incompetency was uncontroverted by the prosecution, which offered only the testimony of two lay witnesses]; *People v. Jackson, supra*, 22 Cal.App.5th at p. 394 [trial court’s determination that competency had been restored not supported by substantial evidence where the hospital report that deemed the defendant competent was preceded and followed by incompetency reports, and it failed to address how competency was regained given that the defendant’s incompetency

resulted from chronic, stable mental retardation].) Accordingly, we reject defendant's challenge to the sufficiency of the evidence supporting the jury's determination that he was competent to stand trial.

DISPOSITION

The judgment is affirmed.

MEEHAN, J.

WE CONCUR:

DETJEN, Acting P.J.

SMITH, J.